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No. 87-1081

In The

Supreme Court of the United States

October Term, 1987

GRAND FORKS-TRAILL WATER USERS, INC.,

v. *Appellant,*

WALTER R. HJELLE
NORTH DAKOTA STATE HIGHWAY COMMISSIONER,

Appellee.

On Appeal from the Supreme Court of the State of North Dakota

MOTION TO DISMISS OR AFFIRM

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MOTION TO DISMISS OR AFFIRM

The Appellee moves the Court to dismiss the appeal herein or in the alternative to affirm the judgment of the Supreme Court of North Dakota on the ground that the questions on which the decision of the case depends have been decided by the Supreme Court of the State of North Dakota in accordance with the provisions of the United States Constitution and are so unsubstantial as to require no further argument or review by this Court.

I.

THE STATUTE INVOLVED AND THE NATURE OF THE CASE

A. THE STATUTE

This appeal concerns the question of whether two North Dakota statutes (North Dakota Century Code Sections 24-01-42 and 24-01-43 enacted in 1959 and amended in 1963–hereafter referred to as the "Setback") are reasonable land use regulations under the states police power by promoting the public's general welfare and safety.

The Setback provides that unless consent is initially obtained from the highway commissioner or board of county commissioners, no person shall construct any electrical supply or communication line, gas, oil or water or other pipeline parallel to and within one-hundred feet of the center line of any state highway right of way or within seventy-five feet of the center line of any county highway right of way. Consent is not required for constructing parallel to highways and streets located in platted townsites, additions, and subdivisions thereof. However, if consent is not obtained, the utility line shall be removed at the utilities expense when removal is required for purposes of highway expansion. The highway commissioner can grant consent after a permit form is filed with the commissioner by the utility. The form provides information on such safety matters as the size of pipeline casing, pipeline pressure, location of appurtenances (vents, manholes, valves, etc.), size of facility, and number of cables, in addition to providing information on the applicants identity and the utilities proposed location.

B. THE PROCEEDINGS BELOW

In 1959, the use of utilities on all unplatted rural, property parallel and within 102 feet of the center line of existing state highway right of way (hereafter Setback Zone) was regulated. In 1963, the Setback Zone was reduced to 100 feet. In 1971 and 1972 several farmers granted Grand Forks-Traill Water Users, Inc. (hereafter GF-TW) utility easements on strips of farm land parallel to and within the regulated Setback Zone of an existing state highway (state Highway 18), but outside the state highway owned right of way. GF-TW constructed its utility line within its easement, but within the Setback Zone and without a permit–even though it acquired permits to construct its utility within state highway owned right of way.

In 1984, the highway department acquired various type easements (extending over those granted to GF-TW) for planned highway construction on Highway 18. The highway department notified GF-TW of the planned highway improvements, and denied GF-TW compensation for any necessary relocation costs created by the construction. In 1985, the planned highway construction proceeded during which grade work removed several feet of earth over GF-TW's buried pipeline. To avoid potential freezing GF-TW relocated its pipeline, but the highway department refused to compensate GF-TW for the relocation costs because no permit was acquired.

In August 1985, GF-TW commenced a declaratory action against the highway commissioner, and requested that the Setback be declared unconstitutional as a taking without compensation, as an equal

protection violation, and as an unlawful delegation of power, and requested damages, attorney fees and costs. The facts were stipulated and the trial court entered its judgment finding the Setback unconstitutional as a taking and in violation of equal protection under both United States' and North Dakotas' Constitutions, and granted GF-TW damages, attorney fees and costs. The highway commissioner appealed to the North Dakota Supreme Court which reversed the trial court, and upheld the constitutionality of the Setback as a proper police power land use utility regulation.

II

ARGUMENT AND LAW

A. APPELLANT LACKS STANDING

GF-TW requests this Court's jurisdiction, but first it must be determined whether GF-TW has standing to request this Court's jurisdiction. Standing requires an injury in fact and cannot be based on the legal interest of others. *Valley Forge Christian College v. Americans United for Separation of Church and State,* 454 U.S. 464 (1982).

The Setback only regulates the use of utility lines on unplatted rural land, basically unimproved farm and ranch land; it does not regulate or affect any other use of the land. The Setback restricts a particular future use of the land similar to a covenant running with the land, but with an escape valve–the permit. In 1959, use of the land was statutorily restricted by the

Setback which required permission prior to utility line construction within the Setback Zone. In 1971 and 1972 GF-TW took its easements subject to the existing Setback restriction on the land.

In other words, if any taking occurred because of the land use restriction (an unsupportable conclusion in itself), the taking was from the landowners who granted GF-TW its utility easements. GF-TW cannot acquire rights in land that the landowner did not have to convey. Consequently, GF-TW acquired a restricted utility easement. The restriction required GF-TW to obtain the highway commissioner's consent before constructing a utility line or no compensation would be made if relocation was required by highway expansion.

GF-TW accepted the easements for what they were. It knew or should have known that the easements were restricted by law. In the face of the restriction requiring a permit to construct a utility line within the Setback Zone, GF-TW did construct within the zone without permission. By doing so, it implicitly, if not explicitly, accepted the condition of not being reimbursed for relocation if highway expansion occurred. As the concurring opinion in the North Dakota Supreme Court decision on this case stated:

> "Not only should a party who requests permission and is denied be entitled to challenge the constitutionality of the law at that time, such action should be a requisite to a challenge. The general rule is that a constitutional question must be raised at the earliest opportunity or it will be deemed waived. 16 Am.Jur.2d Constitutional Law, 206. The proper time to raise the issue was at the time the lines were installed contrary to the statute."

Grand Forks-Traill Water Users v. Hjelle, 413 N.W.2d 344, 350 (ND 1987).

Therefore, GF-TW was not injured in fact by the Setback because it acquired easements already restricted by the Setback; i.e., the injury (if any) occurred to a previous landowner. Even if GF-TW had standing to represent the third party previous landowner's interests, GF-TW waived its standing by not challenging the Setback when it constructed its utility line without obtaining consent: GF-TW by its actions agreed to the Setback's conditions.

B. NO SUBSTANTIAL FEDERAL QUESTION

This case presents no substantial federal question.

1. *Appellant contends that this Court has previously considered a similar case.* Appellant relies on *Panhandle Eastern Pipe Line Co. v. State Highway Commissioner,* 294 U.S. 613 (1935). The *Panhandle* case concerned a Kansas statue that (as interpreted by the Kansas Supreme Court) gave the state highway commissioner the power to force a preexisting gas pipeline company to move its pipeline without compensation from after acquired highway right of way. *Id.* at 615-616. Actually, the facts and argument put forth by the gas pipeline company in *Panhandle* supports the highway commissioner in this case. The pipeline company contended that, "because its rights of way were acquired and its structures were installed before the present highway rights of way had been obtained . . ., it is entitled to compensation. . . ." *Id.* at 617. The pipeline company was correct. If the utility line is in

existence *prior* to the existence of the highway right of way, the utility line owners must be compensated if highway expansion requires relocation; on the other hand, if the utility line was installed *after* the highway right of way was established, the utility must relocate at its own cost. *Arkansas La. Gas Co. v. La. Dept. of Highways,* 104 So.2d 204, 208-209 (La. App. 1958); *Magnolia Pipe Line Company v. City of Tyler,* 348 S.W.2d 537 (Tex. Civ. App. 1961) ; 39 Am.Jur.2d Highways, Streets, and Bridges §278 (1968) (fn. 6). The principal is: First in time, first in right. In this case, the highway commissioner was first in time. The Setback, even after amended in 1963, applied to the land where GF-TW placed its pipeline long (ten years) before GF-TW obtained its easements. Thus, just as the utility line owner must relocate at its own cost when it establishes its utility line later in time to the highway department's establishment of its right of way, Traill Water must relocate at its own cost because it acquired its easements later in time to the enactment of the Setback.

2. *Appellant contends that the Setback effected a taking because it resulted in an actual physical invasion and occupation of an easement.* The 1959 Setback has not resulted in a permanent physical occupation. Its object is nonoccupation. The land within the Setback Zone but outside the highway right of way can bring fair returns to the landowner through other uses; e.g., farming and ranching. Any occupation by the Setback is intangible and does not affect any use other than constructing utility lines. Any occupation by the Setback attached to the land in 1959; thus, GF-TW accepted its easements subject to the Setback's prior

occupation. The Setback may and has, as this case attests, resulted in a temporary physical invasion causing relocation costs to a utility line company. But again, it must be emphasized that GF-TW was granted its easements subject to the prior enacted Setback which allowed for a temporary physical invasion during highway expansion.

3. *Appellant contends that the Setback is not supported by, nor does it substantially advance, legitimate state interests.* The test for determining the constitutional validity of a land use regulation was stated in *Newman Signs, Inc. v. Hjelle,* 268 N.W.2d 741, 755-756 (ND 1978), *appeal dismissed* 440 U.S. 901 (1979):

> "It has generally been held that a reasonable restriction on the use of property pursuant to a state's police power does not constitute a taking of private property for public use requiring payment of just compensation so long as the regulation is reasonably related to a proper purpose and does not unreasonably deprive the property owner of all or substantially all beneficial use of his property. [Citations omitted.]"

In *Newman,* this Court affirmed[1] the North Dakota Supreme Court's holding that the state's regulation of billboards was reasonably related to a proper purpose, and, since only one particular future use of the appellant's property was regulated while leaving available all other uses, the regulation did not have the effect of

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[1] Dismissal of an appeal for want of a substantial question is a disposition on the merits. *Hicks v. Miranda,* 422 U.S. 332, 344 (1975).

depriving the appellant of all or substantially all of the beneficial use of his property. *Id.* at 755-758.

The object of the Setback was to promote the public's general welfare, health and safety. N.D.C.C. §24-01-01. The general welfare purposes of the Setback is akin to those for official mapping laws. The Setback is essentially an official map law that establishes widening lines (setbacks) within which utilities cannot be located without permission. As a land planning tool, the official map has been defined in the following way:

> "The official map technique permits [the state] to effect a present uncompensated reservation of land upon which it plans to construct future improvements. The map, which is adopted legislatively, designates certain areas for roads, (Footnote omitted). . . . The designation operates as a reservation only; title and possession remain with the owner, and the state pays no compensation unless and until actual condemnation proceedings are begun. (Footnote omitted.) The purpose of the reservation is to keep the land substantially open, and thus facilitate planning and ensure lower condemnation costs when and if the land is eventually taken. The [state] effectuates this purpose by either denying applications for building permits in the reserved area, or by providing that compensation will not be paid for subsequent improvements if the land is condemned. Most systems have a variance procedure for the landowner unable to receive a reasonable return on either the restricted parcel or the legal plot as a whole. (Footnote omitted.)
>
> When the official map sets aside land for roads, most courts agree that the regulation relates to a valid public objective of economy and planning. (Footnote omitted.)"

Freilich and Ragsdal, *Timing and Sequential Controls-The Essential Basis for Effective Regional Planning: An Analysis of the New Directions for Land Use Control in the Minneapolis-St. Paul Metropolitan Region,* 58 Minn. Law Review 1009, 1062.

The cost of property acquired for public use is often greatly increased by the construction of improvements after it has been determined that the land will be needed for a future public use. In addition, construction of what amounts to relatively short-lived improvements on such land constitutes economic waste which benefits no one. This is exactly the result which intelligent land planning tools should prevent, since it leads to the necessity for subsequent removal of improvements at great cost to the public and confers little or no benefit to the landowner.

The objective (legitimate state interest) of mapping is to provide the machinery for intelligent land planning. *Headley v. Rochester,* 272 N.Y. 197, 5 N.E.2d 198, 199 (1936) (A portion of the plaintiff's land was included in a street as widened in a revised city map law. *Id.* at 199. Since the plaintiff had no plans for the use of his land located in the mapped area, and had not made application to the city for a permit, the mapping law had not deprived the plaintiff of anything. *Id.* at 201.) ; *State v. Manders,* 2 Wis.2d 365, 86 N.W.2d 469, 472 (1957) (A realtor purchased property that included land within the bed of a mapped street. *Id.* at 471. The realtor applied for a permit to build in the mapped zone, but was denied because he could not show that he would be substantially damaged by locating his building outside the mapped zone. *Id.* at 472.). There is little

doubt that an objective that seeks to achieve better planning is embraced within the concept of promoting the public's general welfare. *Manders,* 86 N.W.2d at 472. Intelligent land planning would be futile if the haphazard development and construction of structures in the bed of planned roadways occurred. *Headley,* 5 N.W.2d at 199. In meeting the possible inequitable results caused by the incumbrance on the use of private property and diminution in value, a permit to build in the mapped area must be provided if the private land was not yielding a fair return to the owner. *Headley,* 5 N.E.2d 200; *Manders,* 86 N.W.2d at 473. Consequently, a mapping law not only is reasonably related to a proper purpose of intelligent land planning, it does not deprive a property owner of the substantial use of his property because a permit must be granted if the property owner can show substantial damage.

The same analysis is applicable to the Setback. As with all mapping laws, the objective of the Setback is to promote orderly state and county highway planning and development so as to prevent the haphazard construction of utility lines which bear no relationship to future road widening. The North Dakota legislature's intent to have an adequate, integrated, safe, and efficient highway transportation system throughout the state is achieved through better highway planning. N.D.C.C. §24-01-01. The Setback allows the state to plan for safe and efficient highway transportation and anticipates inevitable future development of existing roads.

The Setback allows the highway commissioner to plan and expand rural highways to meet existing and

probable future traffic needs and conditions in a manner conducive to safety, durability, and economy of maintenance; and do so in accordance with minimum highway design standards. Widening rural highways benefits all rural residents by creating a road system more adept at safely and physically handling the new larger and heavier vehicles that seed, cultivate, harvest, and transport grain, cattle and other products from farm to market. Hence, planning for highway widening and improvement substantially benefits the public's welfare, health and safety.

The second objective of the Setback, as with mapping, is to protect the economic interests of the public. The objective of protecting the public's economic interest falls within the scope of promotion of the general welfare. *Manders,* 86 N.W.2d at 472. The North Dakota legislature's intent to promote economic and social progess of the state (N.D.C.C. §24-01-01) is achieved by economizing future widening or relocation of rural highways. The Setback protects the public from having to expend substantial sums of money on what are in effect relatively short-lived improvements.

In meeting with possible inequitable results caused by the Setback, the Setback gives the highway commissioner the power to consent to utility line construction within the Setback zone. GF-TW failed to even apply for a permit prior to constructing its utility line. Any deprivation to GF-TW was caused by its business decision, not by the Setback or highway commissioner. Consequently, the Setback not only is reasonably and substantially related to proper and legitimate state interests, it did not deprive GF-TW of the substantial

use of its property because the commissioner would have been required to issue a permit to GF-TW if it had requested a permit and shown that it would be substantially damaged if no permit was issued.

GF-TW acknowledges the constitutionality of mapping laws and cites *Maryland-Nat. Capital Park v. Chadwick,* 405 A.2d 241 (Md. App. 1979) and *Urbanizadora Versalles, Inc. v. Rivera Rios,* 701 F.2d 993 (1st Cir. 1983), as cases which acknowledge the proper use and limits of mapping laws. However, in both cases, unlike the Setback in this case, the mapping laws deprived the landowners of all reasonable use of their land, (*Chadwick,* 405 A.2d at 244; *Rivera Rios,* 701 F.2d at 998), and failed to provide a variance to landowners in equitable situations (*Chadwick,* 405 A.2d at 247; *Rivera Rios,* 701 F.2d at 998). Also, unlike the Setback, the reservations in *Chadwick* and *Rivera Rios* attached to the property after the landowner's acquisition of the property, and substantially affected the landowners use of the land, and the landowners ability to sell the land. (*Chadwick,* 405 A.2d at 243-244; *Rivera Rios,* 701 F.2d at 994-997.)

GF-TW reliance on *Nollan v. California Coastal Commission,* 483 U.S. ___, 107 S.Ct. 3141 (1987) is similarly misplaced. "In *Nollan,* the conditioning of a building permit upon Nollan's 'transfer to the public of an easement across their beach front property' (107 S.Ct. at 3143) was held to be a 'permanent physical occupation' (107 S.Ct at 3145) constituting a taking requiring compensation." *Grand Forks-Traill Water Users, Inc.,* 413 N.W.2d at 348. In *Nollan,* the land could not be used for anything other than an unprofitable public foot highway to the beach. As argued earlier,

the Setback is not a permanent physical occupation. The Setback merely regulates the placement of utility lines within the Setback Zone, but the landowner can farm, ranch, and otherwise use the land in typical rural North Dakotan ways that bring fair returns. Finally, the public easement (land regulation) in *Nollan* was attempted to be obtained by the state *after* the Nollan's acquired the property (or as a condition of their acquisition). *Id.* 3141. Conversely, and as it has been emphasized throughout this Motion to Dismiss or Affirm, the Setback was enacted and attached by law to the property *prior* to GF-TW acquiring its easements.

4. *Appellant contends that the Setback impermissibly imposes a detriment to a private property interest because it serves an enterprise rather than an arbitation function of state government.* The highway commissioner has previously argued that the Setback was enacted by the North Dakota legislature under its police power to regulate the use of property within the Setback Zone. As distinguised from eminent domain which requires compensation for taking property for public use, the Setback regulates property not for public use but to conserve the public's general welfare, safety and health. 16 Am.Jur.2d Constitutional Law, §365.

Contrary to GF-TW's argument, the Setback does balance the benefits and burdens arising from it's application. A utility line 80 feet or 105 feet from the center line of a rural state highway in North Dakota, at either distance, is on basically unimproved rural farm or ranch land. The setback does not apply to platted land. Whether a water utility line is at 80 feet or 105 feet it

will be buried at least below the frost line (6 to 8 feet) and will not disturb the use of the land for other use, such as farming or ranching. However, at 80 feet, the water utility line will likely be required to be relocated at the time of highway expansion. The cost of relocation will be to the public in paying for materials, equipment, and labor in relocating the existing utility (not to mention the material waste and disposal of nonreusable water utility line), to the water utilities customers for the interference and disruption of service, and to the utility line company in having to use its labor on a relocation project when it could work on other projects. Building the water line at 105 feet will result in none of these costs when highway expansion occurs. The fact is, construction of utility lines within the Setback area results in a relatively short-lived utility improvement which, in turn, constitutes an economic and material waste benefiting no one and burdening everyone.

III.

CONCLUSION

The appellant, GF-TW, cannot establish its standing to engage this Court's jurisdiction; the appellant's jurisdictional statement and the North Dakota Supreme Court decision do not present this Court with a substantial federal question to review and the appeal should be dismissed; or, based on the appellant's issues presented on appeal being so wanting in substance as to not need further argument, the North Dakota Supreme Court decision should be affirmed.

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